No. 00-3611 MNMI

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Lonnie Glover and Dawn Glover,

Plaintiffs-Appellees,

vs.

Standard Federal Bank,

Defendant-Appellant,

and Heartland Mortgage Corp.,

Defendant.

Appeal from the United States District Court
for the District of Minnesota, Case No. 97-2068

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

More than half the residential mortgage loans in this country are originated through mortgage brokers. Plaintiffs/Appellees Lonnie and Dawn Glover (the "Glovers") challenge a fundamental aspect of this method of mortgage lending–the manner in which mortgage brokers are compensated for their work. The Glovers bring their case under section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607 et seq.

This appeal is from the order of the district court certifying a nationwide class. The district court's class certification order is contrary to all other decisions in this Circuit and contrary to the overwhelming majority of decisions nationwide. In certifying a class, the district court improperly rejected the loan-specific liability test promulgated by the Department of Housing and Urban Development ("HUD"), the federal agency charged with enforcement of RESPA. HUD's loan-specific test recognizes that lender-paid compensation, such as yield spread premiums, may properly be used as a mechanism for financing the costs of closing a mortgage loan, including compensation to the mortgage broker. Whether a yield spread premium was used in this fashion can only be determined by loan-specific proof. Individual questions will predominate, making class treatment an abuse of discretion.

Because of the significance of this case to consumers, to mortgage brokers and

to wholesale lenders, Standard Federal requests 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, the following is a complete list of Standard Federal Bank's parent corporations:

Standard Federal Bancorporation, Inc. owns 100% of the shares in Standard Federal Bank;

ABN AMRO North America, Inc. owns 100% of the shares in Standard Federal Bancorporation, Inc.;

ABN AMRO North America Holding Company owns 100% of the shares of ABN AMRO North America, Inc.; and

ABN AMRO Bank N.V. owns 100% of the shares in ABN AMRO North America, Inc.; and

ABN AMRO Holding N.V. owns 100% of the shares of ABN AMRO Bank N.V.

ABN AMRO Holding N.V. is publicly traded in Europe and is traded in the United States as American Depository Receipts.

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellees brought this action under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq. The district court had subject matter jurisdiction pursuant to 12 U.S.C. § 2614 and 12 U.S.C. § 1331.

On September 26, 2000 the district court granted Plaintiffs/Appellees' motion for class certification. On October 11, 2000, Appellants timely filed a petition seeking review of that order pursuant to Fed. R. Civ. P. 23(f), which this court granted on November 1, 2000. This Court has appellate jurisdiction over this interlocutory appeal pursuant to Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292.

STATEMENT OF ISSUES

Whether the district court applied an improper legal standard for establishing a violation of RESPA section 8, and therefore abused its discretion in certifying a nationwide class, where:

1. Every other decision in this Circuit, and the overwhelming majority of decisions across the nation, hold that individual, rather than common, issues predominate under the proper legal standard for establishing whether yield spread premiums fall within the RESPA section 8(c) exemption.

   In re Old Kent Mortgage Co. Yield Spread Premium Litig., 191 F.R.D. 155 (D. Minn. 2000); Levine v. North Am. Mortgage, 188 F.R.D. 320 (D. Minn. 1999), petition for review denied, (8th Cir. Sept. 2, 1999); Emory v. Delta Funding Corp., 190 F.R.D. 627 (N.D. Ga. 1999); Taylor v. Flagstar Bank, FSB, 181 F.R.D. 509

(M.D. Ala. 1998).

2. HUD's binding Policy Statement (the Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999)) sets forth the proper legal standard for establishing whether yield spread premiums fall within the RESPA section 8(c) exemption, which requires a loan-specific, two-step inquiry to determine: (a) the nature of the specific goods, facilities and services provided by the mortgage broker in a loan transaction; and (b) the reasonableness of the broker's total compensation to the value of the broker's work.

   Policy Statement, 64 Fed. Reg. at 10080; Levine, 188 F.R.D. 320; Brancheau v. Residential Mortgage Group, 187 F.R.D. 591 (D. Minn. 1999); Potchin v. The Prudential Home Mortgage Co., No. 97-CV-525 (CBA), 1999 WL 1814612 (E.D.N.Y. Nov. 15, 1999), petition for review granted (2d Cir. July 12, 2000); Golan v. Ohio Savings Bank, No. 98 C 7430,1999 WL 965593 (N.D. Ill. Oct. 14, 1999), petition for rev. denied (7th Cir. Nov. 16, 1999).

3. The Culpepper legal standard for establishing whether yield spread premiums fall within the RESPA section 8(c) exemption, properly interpreted, requires a loan-specific inquiry to determine whether the broker and borrower intended the yield spread premium to finance closing costs, including additional compensation to the broker.

   Taylor, 181 F.R.D. 509; Richter v. Banc One Mortgage Corp., No. CIV 97-2195 PHX RCB, 1999 U.S. Dist. LEXIS 16074 (D. Ariz. Mar. 19, 1999), petition for review denied (9th Cir. June 18, 1999).

4. The threshold legal standard for establishing a "referral" under RESPA section 8(a) requires a loan-specific showing that yield spread premium "affirmatively influenced" the broker's selection of the lender to fund a particular loan.

   Barbosa v. Target Mortgage Corp., 968 F. Supp. 1548 (S.D. Fla. 1997).

5. A class action is not superior and would be unmanageable, given the myriad of individual questions that predominate, and the feasibility of individual actions in light of treble damages and attorneys' fees provided by RESPA section 8.

Taylor v. Flagstar Bank, 181 F.R.D. 509.

STATEMENT OF THE CASE

A. The Nature of the Action.

The Glovers commenced this class action in September 1997 against Standard Federal Bank ("Standard Federal"), the wholesale mortgage lender that funded their mortgage loan, and Heartland Mortgage Corp. ("Heartland"), the mortgage broker that originated their loan. The Glovers alleged, inter alia, that Standard Federal's compensation to Heartland and other mortgage brokers in the form of "yield spread premiums" and other pricing adjustments, violates section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607.

B. The District Court's Three Class Certification Orders.

The district court has issued three separate class certification orders. The first order, entered on August 26, 1999, denied the Glovers' motion for class certification on the grounds that individual, not common, questions predominated on the Glovers' RESPA section 8 claims. (See August 26 Order at 5.) (Appellant's Addendum ("Add.") at 5.) The August 26 order employed the analysis of the HUD Policy

Statement, and was consistent with the unanimous authority in this Circuit and the overwhelming majority of decisions nationwide, in denying class status in other yield spread premium cases.[1] (Add.9.)

Seven months later, on March 22, 2000, the district court issued its second class certification order in response to the Glovers' "renewed" motion for class certification. The March 22 order ("March Order") reversed the earlier order denying class certification, and certified a class explicitly "defined as all people obtaining a mortgage brokered by Heartland and financed by Standard Federal . . . ." ("Heartland Class") (March Order at 11 (emphasis added).) (Add.21.) This single-broker class includes approximately 75 Minnesota loans.

The district court recognized that class certification in yield spread premium cases turns upon the legal "standard for assessing violations of RESPA." (Id. at 5.) (Add.15.) Contrary to its first class certification order, the district court this time rejected the HUD Policy Statement in favor of its interpretation of the "Culpepper test"– the decisions of the Eleventh Circuit in Culpepper v. Inland Mortgage Corp., 132 F.2d 692 (11th Cir. 1998) ("Culpepper I"), petition for reh'g denied, 144 F.3d 717 (11th Cir. 1998) ("Culpepper II"). In doing so, the district court acknowledged that

[1] The Glovers' Rule 23(f) petition for permission to appeal the August 26 order was denied by this Court on October 1, 1999.

it was "breaking rank" with all other decisions in this Circuit, "creat[ing] a schism" which needs to be resolved by "a higher authority."[2] (Id. at 11.) (Add.21.) Despite the district court's plea for appellate guidance "to settle the debate," (id.), this Court denied Standard Federal's Rule 23(f) petition on June 8, 2000.

On September 26, 2000, the district court changed its class certification position for the third time in little over a year, and issued another class certification order, which is the subject of this appeal. The September 26 order ("September Order") abandoned the Minnesota, single-broker Heartland Class, and granted certification of a new, nationwide class, many thousands of times larger. The September Order certified a class defined as all "individuals who obtained a mortgage financed by Standard Federal Bank and brokered by any mortgage broker." (September Order at 3 (emphasis added).) (Add.29.) This nationwide class encompasses potentially hundreds of thousand of loans, originated by thousands of mortgage brokers. This nationwide class subsumes the earlier single-broker Heartland Class.

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[2] The March Order also (1) granted Standard Federal's motion for summary judgment on all the Glovers' claims except the RESPA claim, and (2) denied the Glovers' motion for class-wide summary judgment on the RESPA claim. Pursuant to the district court's May 31, 2000 order (Add.27), Standard Federal filed a petition for interlocutory review under 28 U.S.C. § 1292(b) seeking review of the district court's denial of summary judgment on the RESPA claim. This Court denied the petition on July 26, 2000.

C. Standard Federal's Appeal.

On November 1, 2000, over the Glovers' objection that this Court lacks appellate jurisdiction, the Court granted Standard Federal's Rule 23(f) petition, and accepted interlocutory review of the district court's September Order. Following the docketing of the appeal, the Glovers moved to dismiss the appeal, renewing the identical argument that the Court lacked appellate jurisdiction. The Court again rejected the Glovers' jurisdictional argument and denied the Glovers' motion to dismiss on December 6, 2000.

D. Post-Appeal Developments.

Since this Court accepted review of the class certification order, the district court has granted the Glovers' motion to amend the complaint to add an affiliated corporation as a defendant. (Order dated January 29, 2001 of the Honorable Susan Richard Nelson, United States Magistrate Judge.) Pursuant to the Amended Pre-Trial Schedule, this case is scheduled for trial on the claims of the Heartland class in September 2001. The district court has denied Standard Federal's motion to stay proceedings pending resolution of this appeal.

STATEMENT OF FACTS

A. Standard Federal Bank.

Standard Federal is engaged in the business of retail and wholesale mortgage lending.[3] In its wholesale operations – the business segment at issue in this case – Standard Federal funds mortgage loans originated by mortgage brokers. (Appellant's Separate Appendix ("A.") at 281; 291.) There are thousands of independent mortgage brokers in Standard Federal's broker network, including the Glovers' broker, Heartland Mortgage. (A.281.) All of these brokers are "non-exclusive;" i.e., each broker does business with other wholesale lenders. (Id.) Standard Federal acquires broker-originated loans at the time of loan closing. (A.281; 291.)

B. The Origination of Loans By Mortgage Brokers.

Mortgage brokers play a major role in residential real-estate financing. According to HUD, over half of all home mortgages made each year in the United States are originated by mortgage brokers. Policy Statement, 64 Fed. Reg. 10080. (Add.36.) In originating mortgage loans, brokers provide a wide array of services to borrowers and wholesale lenders. (A.285.) Mortgage brokers also offer "goods and facilities such as reports, equipment, and office space to carry out their functions."

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[3] Standard Federal ceased originating wholesale mortgage loans as of December 31, 1998 when its parent consolidated all mortgage banking activities and moved all wholesale lending operations from Standard Federal. (A.500.)

Policy Statement at 10081. (Add. 37.) Brokers are entitled to compensation for their work, which may properly come from the borrower, from the wholesale lender, or from both.[4] Policy Statement, 64 Fed. Reg. at 10081. (Add.37; 290; 299.)

1. Mortgage Brokers Provide Goods, Facilities and Services.

Mortgage brokers handle many of the tasks which are necessary to originate, process and close a mortgage loan. Brokers act as intermediaries among all involved parties, such as the seller, closing agents, title insurers and appraisers. (A.285.) Mortgage brokers may perform services such as taking information from the prospective borrower and filling out the loan application; analyzing the borrower's income and debt and pre-qualifying the borrower; educating the borrower in the home buying and financing process; counseling the borrower about the different types of loan products available; collecting financial information; arranging for property appraisals and inspections; or assisting the borrower in clearing credit problems as well as fulfilling many more functions. (Id.) One of the most important services mortgage brokers perform is the recommendation of an appropriate wholesale lender for the individual borrower, taking into account such factors as the various wholesale lenders'

[4] The compensation that wholesale lenders pay mortgage brokers may be referred to by any number of terms, such as "servicing release premiums" or "yield spread premiums." Policy Statement, 64 Fed. Reg. at 10081. (Add.37.) In the interest of brevity, such compensation is hereinafter referred to as "yield spread premiums."

loan products, underwriting requirements and flexibility, and other aspects of the wholesale lenders' programs. (A.297.)

Although certain services are generally required to bring a loan to closing, the specific services a broker performs vary from loan-to-loan, because each borrower is different, each property is different, and each transaction is unique. (A.3-4.) The time and effort required to provide the various services also vary greatly from loan to loan. (A.286-87; 296-97.)

2. The Wholesale Lender Funds Broker-Originated Loans.

Wholesale lenders such as Standard Federal fund loans originated by mortgage brokers. Standard Federal establishes the wholesale price for originating loans and communicates wholesale pricing to the brokers through daily rate sheets. (A.281-82.) These rate sheets set forth the prices that Standard Federal will pay brokers for various types of mortgage products at various interest rates, taking into account variables such as the type of property involved, the occupancy status of the property, the size of the loan, the lock-in period, and the interest rate.[5] (Id.) Wholesale pricing sheets express the price options for loans that Standard Federal will purchase "above par," "at par,"

[5] A pricing sheet sets forth wholesale, not retail prices. The pricing sheet is designed for use by industry professionals only. Because of the prohibitions of the Truth-in-Lending Act, 15 U.S.C. § 1601 et. seq., the rate sheets themselves cannot be distributed to consumers. (A.282.)

and "below par."[6] (Id.) An "above par" loan provides additional compensation from Standard Federal to the broker in the form of yield spread premium credit; loans "below par" require the payment of discount points to Standard Federal; a loan "at par" is one where Standard Federal neither pays a credit nor receives discount points. (Id.)

A higher interest rate loan is not more profitable to Standard Federal than a loan bearing a lower interest rate. (A.283.) The wholesale prices offered on a rate sheet for a particular loan product (whether at, above, or below par) are designed to provide the same net yield to Standard Federal. (Id.) If anything, Standard Federal prefers to purchase a lower interest rate loan, because higher interest rate loans are more likely to refinance. (Id.) When a borrower pays off a loan through refinancing, Standard Federal loses the servicing income on that loan.[7] (Id.)

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[6] "Par" is a benchmark rate at which neither a yield spread premium adjustment nor discount points are paid or received. One discount point is equal to one percent of the principal amount of the mortgage loan. (A.282.)

[7] During the relevant time period, Standard Federal also serviced loans. (A.280.) "Servicing" includes the obligation to collect payments for the reduction of principal and application of interest, paying taxes and insurance, remitting collected payments, providing foreclosure services, escrow administration, and any other obligations required by the owner of a mortgage loan. This servicing work is performed for a servicing fee. (A.280.)

3. The Retail Price of a Loan Which is Established by the Broker and the Borrower, Includes Interest, Broker Compensation and Other Costs.

The borrower's cost of obtaining financing includes direct charges such as fees for appraisals, credit reports and other items. (A.288.) The borrower's cost also includes broker compensation.[8] A critical issue is how the borrower chooses to pay these costs – "up-front" in cash or by financing some (or all) of those costs over the life of the loan. Yield spread premiums can help reduce the up-front cost to consumers, thereby allowing them to obtain loans without paying direct fees themselves. Policy Statement, 64 Fed. Reg. at 10081. (Add.37.)

The flexibility provided by Standard Federal's wholesale pricing options permits mortgage brokers to offer a wide range of pricing options to borrowers and to tailor a loan to meet the individual borrower's financial needs and objectives. (A.288.) For example, brokers offer "no points/low closing costs" loans, which are extremely popular with borrowers. (Id.) This loan product can only be provided because yield spread premium credits offered by the wholesale lender are used to pay all or a significant part of the broker's compensation and other closing costs of the borrower. (Id.) The "no points/low closing costs" loan has an interest rate that is higher than the

[8] Broker compensation and the interest rate are established by the mortgage broker, working in conjunction with the borrower. (A.288.)

interest rate available if full closing costs are paid by the borrower in cash "up-front," but a borrower may prefer, or require, this type of loan because it requires minimal out-of-pocket expenditures. (A.299.) In these loans, all of the broker's compensation and other costs are derived from the yield spread premium credit offered by the wholesale lender, i.e., the yield spread premium. (Id.) Beyond no points/low cost loans, there is a range of combination of interest rates and points that the borrower may choose. (A.289.) Depending upon the borrower's preferences and objectives, the combination of borrower-paid fees and lender-paid fees may fall anywhere on this continuum. (Id.)

4. Loan-Specific Factors Influence Broker Compensation.

Numerous factors influence the broker's retailing pricing, including its costs and borrower preferences. The mortgage broker's cost of making a loan varies with the nature and extent of the services the broker provides in each mortgage loan transaction, including the effort involved in closing the loan, the time involved in bringing the loan to closing, the borrower's credit status, the loan program selected by the borrower, where the borrower lives, and other factors.[9] (A.287.) The costs,

[9] Factors which influence the time and effort a broker must expend on behalf of a borrower include the borrower's credit history and credit status; the size of the loan; the loan program for which the borrower is applying (e.g., conventional loan or a government loan product); whether the borrower is self-employed; the number of co-borrowers; the relationship between the value of the security and the loan sought;

expressed as a percentage of loan amount, also vary from loan to loan. (Id.) For example, the broker's cost as a percentage of the loan amount is sometimes higher on a small loan than on a large loan. (Id.) In addition to these variable costs, the mortgage broker has certain fixed costs, such as rent and labor. (Id.) The only way the broker can recover fixed and variable costs, and make a profit on the business, is through the compensation it receives when a loan closes; a broker does not recover any compensation on loans that do not close. (A.299-300.)

The broker's retail pricing is subject to the constraints of the marketplace and to local competitive conditions. (A.298-300.) Because the mortgage lending business is extremely competitive, a potential borrower may easily take his/her business to another mortgage broker or lender. (Id.) The broker's retail pricing must be competitive with other mortgage brokers and mortgage lenders. (Id.)

The method by which mortgage brokers collect compensation for their work depends upon how the loan is structured. Policy Statement, 64 Fed. Reg. at 10081. (Add.37.) Where a broker is not paid by the consumer through a direct fee, or is only partially paid through a direct fee, the interest rate of the loan may be increased to compensate the broker indirectly, through a yield spread premium. (Id.) (Add.37.)

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whether the borrower "locks in" or reserves the interest rate at the time of application; the responsiveness of the borrower and third parties to requests for information; and the amount of counseling the borrower requires. (A.286-87; 296-97.)

The yield spread premium, combined with fees paid by the borrower, reflects the mortgage broker's judgment as to how much the broker must receive to be fully compensated for the goods, services, and facilities it provides. (A.292; 298; 309-10.) The connection between services provided by the broker and the yield spread premium lies in the manner in which the broker prices its services at retail. It is the broker's responsibility to assure that the total compensation received by the broker, from all sources, is reasonable. (A.292.)

C. Standard Federal Pays Brokers for Goods, Facilities, and Services.

The services performed by a mortgage broker, from the initial loan application through closing, not only benefit borrowers, but are also valuable to Standard Federal. (A.285.) If Standard Federal were to originate the loans itself, it would have to perform the functions provided by the brokers. (Id.) Standard Federal would then incur the type of fixed and variable costs (e.g., "bricks and mortar" and employee costs) that are borne by the brokers. (Id.) Thus, by using mortgage brokers, Standard Federal can avoid the expenses associated with retail lending. (Id.) The compensation Standard Federal makes available to the mortgage broker, is intended to provide additional compensation to the broker for the goods, facilities and services provided by the broker and/or to defray the borrower's closing costs. (A.292.)

D. The Named Plaintiffs.

The Glovers obtained the mortgage loan which is the subject of this litigation–a loan in the amount of $124,000 – through Heartland on September 19, 1996. The Glovers had learned that interest rates had fallen and decided that it was an advantageous time to refinance their existing mortgage loan. The Glovers wanted to refinance in order to consolidate debt and to get a lower interest rate. (A.413.) The Glovers were experienced in the home lending process. Since acquiring the original mortgage on their home in 1987 or 1988, the Glovers had already refinanced twice, in 1990 and 1993. (A.340-45.)

The Glovers were well aware that there are many sources of mortgage financing available. (A.399.) They had tracked mortgage interest rates from time to time, and knew that information on interest rates was readily available from public sources. (A.344-47.) Based upon the information they acquired through media sources and through Heartland Mortgage, the Glovers concluded that the interest rate offered to them by Heartland Mortgage was as good as they could obtain in the marketplace. (A.413.) The Glovers also knew the importance of comparison shopping. Mr. Glover testified that "usually you don't go with the first company you hear of . . . you have to make comparisons." (A.399.)

The Glovers also knew the significance of weighing the costs of financing in

terms of up-front costs and interest rate. For example, in response to a question of whether they would have been willing to pay more cash up front to get a lower rate, Mrs. Glover testified that they might have done so, if it would mean savings in the long run – they would have to balance out those two things. (A.364.)

In connection with the 1996 transaction, Heartland provided many valuable services. Heartland met with the Glovers in person and provided them with information about the loan process, different types of loans available, and the closing costs; helped them fill out a loan application; went over their financial situation; answered any questions they had; analyzed their income and debt; verified the information Glovers' provided; obtained appraisals for Glovers' property; and provided various disclosures. (A.497-99.)

Heartland received total compensation of $3,125 for its work, consisting of a $1,240 origination fee and a $335 processing fee (paid by Glovers), as well as a yield spread premium in the amount of $1,550 (paid by Standard Federal). The amounts were disclosed in the Glovers' HUD-1 Settlement Statement. (A.52.) It is undisputed that Heartland's total compensation was reasonable in light of the goods, services, and facilities Heartland devoted to the Glovers' loan transaction. (A.300-01.)

SUMMARY OF ARGUMENT

This case is one of more than one hundred fifty cases around the country challenging lender payments to mortgage brokers under RESPA section 8. Section 8(a) of RESPA prohibits the payments of referral fees and kickbacks. Section 8(c) of RESPA, however, specifically exempts from section 8(a) the payment of compensation to those who perform services and furnish goods and facilities. The proper legal standards for establishing a violation of RESPA section 8 are fraught with individual questions which make these cases patently inappropriate for class treatment. For this reason, all eight other federal district court decisions in this Circuit, and 36 other federal district court decisions around the country, have denied class certification on RESPA section 8 claims in yield spread premium cases virtually identical to this case. Conversely, only the district court below, and a handful of decisions from a single court—the Northern District of Alabama—have reached a contrary conclusion.

This Court should reverse the district court's order certifying a nationwide class, potentially implicating hundreds of thousands of loans, originated by thousands of different brokers. While the district court's class certification decision is reviewed for abuse of discretion, the district court's reading of the law that underlies that decision is reviewed de novo, and the failure to properly apply the law by definition constitutes an abuse of discretion. In this case, the district court class certification

order is founded entirely upon the application of an erroneous legal standard for determining a violation of RESPA section 8.

To begin, the district court applied an erroneous standard for determining whether the yield spread premiums satisfy the RESPA section 8(c) exemption. In response to a Congressional directive resulting from an onslaught of litigation, the federal agency charged with implementing RESPA, HUD, issued a Policy Statement which articulates the legal standard for establishing whether a yield spread premium satisfies the RESPA section 8(c) exemption. Initially, HUD observed that yield spread premiums are not per se illegal and that they may properly be used by the borrower to finance closing costs, including broker compensation. HUD's Policy Statement then sets forth a two-step test which analyzes (1) the nature of the broker's work in originating a loan and (2) the reasonableness of the market value of the broker's total compensation. Both steps of the test are fraught with individual issues making this case patently inappropriate for class treatment. The district court rejected the HUD Policy Statement and thereby committed reversible error.

The district court improperly substituted its own judgment for that of HUD, and applied its own legal standard, ostensibly based on the Eleventh Circuit's Culpepper decision. Even if Culpepper set forth the controlling legal standard under RESPA section 8(c), Culpepper does not support the district court's class certification order.

Properly read, Culpepper , like the HUD Policy Statement, precludes class treatment because it acknowledges that loan transactions are structured in a variety of ways and that yield spread premiums may properly be used to finance the costs of closing a loan. Depending upon an individual borrower's financial needs and objectives, the borrower may choose to finance all or a portion of the closing costs, including compensation owed to the mortgage broker for the broker's work in connection with the origination of the loan. The determination of whether to finance closing costs is always made on a loan-specific basis—it is never susceptible to class-wide proof.

In addition, the district court failed to consider the legal standard for determining whether a yield spread premium is a "referral" in violation of RESPA section 8(a). In order to meet the statutory definition of "referral fee" under section 8(a), the yield spread premium must "affirmatively influenc[e]" the broker's selection of the particular lender to fund the loan. Because there are a multitude of reasons why mortgage brokers select a wholesale lender, the question of whether the requirements of section 8(a) are satisfied requires an examination of the factors which influenced the broker's decision in each class members' loan transaction.

Finally, the district court abused its discretion in concluding that class treatment was "superior." Class treatment is not superior, because the loan-specific evidence required to determine compliance with section 8 of RESPA would render the case

unmanageable. In light of RESPA's provision for treble damages and attorneys' fees, adjudication of individual cases is the superior method of resolving claims.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE LEGAL STANDARDS.

A. The Standards for Class Certification Under Fed. R. Civ. P. 23.

The proponent of a class action has the burden of establishing all the prerequisites of Fed. R. Civ. P. 23. See General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). In addition to satisfying the requirements of Fed. R. Civ. P. 23(a),[10] the proponent of a class action

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[10] In order to satisfy Rule 23(a), the proponent of a class action must show: (1) the class is so "numerous" that joinder of all members is impracticable; (2) there are questions of law or fact "common" to the class; (3) the Glovers' claims and Standard Federal's defenses are "typical" of the claims of the class and Standard Federal's defenses to the claims of the class; and (4) the Glovers will "adequately" protect the interests of the class. Fed R. Civ. P. 23(a). See Amchem Prods., Inc. v. Windsor, 531 U.S. 591, 606-07& nn.8-10 (1997).

The facts of the Glovers' loan transaction defeat the typicality and adequacy elements of Rule 23(a)(3) and (a)(4). As one court has stated: "[t]he detailed circumstances of each borrower-broker transaction are critically material to the claims presented." Barboza, 1998 WL 148832 at *5, (Add.236.) In short, there is no "typical" case, and it follows that the prerequisite established by Rule 23(a)(3) is not met. It further follows that the Glovers are not adequate representatives under Rule 23(a)(4) for absent class members who have different kinds of claims or different prospects of success on whatever claims they have. See Anchem, 117 S. Ct. at 2251 and n. 20.

must show that the class fits within one of the subsections of Rule 23(b). Where, as here, class certification is sought under Rule 23(b)(3), the proponent of a class action must show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed R. Civ. P. 23(b)(3). See Amchem Prods., Inc. v. Windsor, 531 U.S. 591, 607 & nn.10 & 12 (1997). The predominance test under Rule 23(b)(3) is "far more demanding" than the commonality test in Rule 23(a). Amchem, 531 U.S. at 623-24. Courts are required to conduct a "rigorous analysis" to ensure that the proponent of a class action has carried its burden to show that the Rule 23 requirements are satisfied. See General Tel. Co., 457 U.S. at 161. Class certification is not presumed. See id. Naked allegations cannot "transform [the] litigation . . . into an action where common questions of fact and law predominate." Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 604 (S.D.N.Y. 1982). A court may not, therefore, merely accept bald assurances that the case involves common proof or common defenses which are susceptible to class-wide resolution. See Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996).

Moreover, while it is impermissible at the class certification stage for a court to resolve the merits of the litigation, the rigorous class certification analysis "cannot be

divorced from the merits." Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 835 (7th Cir. 1999). Instead, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" General Tel., 457 U.S. at 160 (citation omitted). A court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. Absent knowledge of how [individual] cases would actually be tried . . . it [is] impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials." Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

The Rule 23(b)(3) standards for class certification are not satisfied in this case. Individual issues predominate on both the Glovers' RESPA section 8 claims and Standard Federal's defenses because liability can only be determined through individual loan-specific facts. Individual actions, rather than a class action, are, therefore, the superior method for the fair and efficient adjudication of the controversy. Accordingly, this Court should reverse the district court's order certifying a nationwide class.

B. Standard of Review.

While a class certification order is reviewed under an abuse of discretion standard, the district court's order in this case is an abuse of discretion because it is founded upon an erroneous interpretation of RESPA section 8. As such, it is entitled to de novo review. "[T]he district court's reading of the law that controls its discretionary certification is of course reviewed de novo for error." Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1388 n.30 (11th Cir. 1998). In other words, "the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." Koon v. United States, 518 U.S. 81, 100 (1996). "A district court by definition abuses its discretion when it makes an error of law." (Id.) Accord Jenkins ex rel. Jenkins v. Missouri, 158 F.3d 980, 982 (8th Cir. 1998).

C. The Substantive Legal Standards of RESPA Section 8.

The district court's certification of a nationwide class turns entirely on the district court's failure to properly interpret RESPA section 8. Application of the proper interpretation of the statute would preclude class certification.

1. RESPA Section 8's Statutory Framework.

The Glovers allege that Standard Federal's yield spread premiums and other pricing adjustments to mortgage brokers violate RESPA section 8(a) which provides:[11]

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a).

Sections 8(a) is modified, however, by section 8(c), which exempts certain payments from the section 8(a) prohibitions. Section 8(c) provides in part:

> Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

12 U.S.C. § 2607(c)(2). Thus, a yield spread premium which satisfies RESPA section 8(c) is lawful regardless of whether it falls within section 8(a).

2. HUD's Interpretations of RESPA Section 8.

The Department of Housing and Urban Development ("HUD") is the federal agency charged with the administration and interpretation of RESPA. See 12 U.S.C. § 2617(a). Pursuant to the authority delegated to it by Congress, HUD promulgated

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[11] The Glovers also asserted a violation of section 8(b), 12 U.S.C. § 2607(b). The district court did not certify the section 8(b) claim.

Regulation X, 24 C.F.R. § 3500 et seq. and, more recently, issued its Policy Statement. (Add.36.) Together, these HUD pronouncements set forth a comprehensive legal standard for determining whether a yield spread premium is lawful under RESPA.

For example, HUD has set forth a threshold legal standard for establishing that a yield spread premium constitutes a "referral" in violation of RESPA section 8(a). HUD defines a "referral" under section 8(a) as a payment which "has the effect of affirmatively influencing the selection by any person of a provider of a settlement service." 24 C.F.R. § 3500.14(f)(1).

In addition, HUD has set forth a legal standard for determining whether a yield spread premium satisfies the RESPA section 8(c) exemption. This loan specific, two-step test focuses on: (1) the nature of the work performed by the broker in connection with the origination of the loan; and (2) the reasonableness of the relationship between the broker's "total compensation" (from both the lender and the borrower) and the market value of the work performed by the broker in connection with the origination of the loan. See 64 Fed. Reg. at 10084-86. (Add.40-42.)

II. THE DISTRICT COURT'S DECISION IS CONTRARY TO EVERY OTHER YIELD SPREAD PREMIUM DECISION IN THIS CIRCUIT AND THE OVERWHELMING MAJORITY OF DECISIONS NATIONWIDE.

The district court's decision certifying a nationwide class in this case is contrary

to every other district court decision in this Circuit, and contrary to the overwhelming majority of federal district court decisions around the country. To date, 44 federal district court decisions—including eight in this Circuit[12] and 36 additional decisions around the nation[13]—have denied class certification in analogous

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[12] See In re Old Kent Mortgage Co. Yield Spread Premium Litig., 191 F.R.D. 155 (D. Minn. 2000); Levine v. North Am. Mortgage, 188 F.R.D. 320 (D. Minn. 1999), petition for review denied, (8th Cir. Sept. 2, 1999); Brancheau v. Residential Mortgage Group, 187 F.R.D. 591 (D. Minn. 1999); Lee v. N.F. Investments, Inc., No. 4:99CV426 ERW (E.D. Mo. Mar. 15, 2000) (Add.44); Johnson v. Resource Bancshares Mortgage Group, Inc., No. 97-2378 (DWF/AJB) (D. Minn. Aug. 27, 1999), petition for review denied, (8th Cir. Oct. 1, 1999) (Add.91); Kroskin v. Aggressive Mortgage. Corp., No. 98-600 (D. Minn. July 12, 1999), petition for review denied, (8th Cir. Aug. 12 1999) (Add.100); Yasgur v. Aegis Mortgage Corp., No. 98-CV-121 (D. Minn. Mar. 10, 1999), petition for review denied, (8th Cir. Apr. 6, 1999) (Add.158); Schmitz v. Aegis Mortgage Corp. ("Schmitz I"), No. 97-3142, 1998 WL 110084 (D. Minn. Aug. 3, 1998) (Add.214).

[13] See Emory v. Delta Funding Corp., 190 F.R.D. 627 (N.D. Ga. 1999); Briggs v. Countrywide Funding Corp., 188 F.R.D. 645 (M.D. Ala. 1999), petition for rev. stayed (11th Cir. Nov. 29, 1999); Taylor v. Flagstar Bank, FSB, 181 F.R.D. 509 (M.D. Ala. 1998); Marinaccio v. Barnett Banks, Inc., 176 F.R.D. 104 (S.D.N.Y. 1997); Briggs v. Countrywide Funding Corp., 183 F.R.D. 576 (M.D. Ala. 1997); Dubose v. First Sec. Sav. Bank, 183 F.R.D. 583 (M.D. Ala. 1997); Moniz v. CrossLand Mortgage Corp., 175 F.R.D. 1 (D. Mass. 1997); Barbosa v. Target Mortgage Corp., 968 F. Supp. 1548 (S.D. Fla. 1997); Sicinski v. Reliance Funding Corp., 82 F.R.D. 730 (S.D.N.Y. 1979); Isara v. Community Lending, Inc., No. 99-00130SPK (D. Haw. Jan. 19, 2000) (Add.58); Potchin v. The Prudential Home Mortgage Co., No. 97-CV-525 (CBA), 1999 WL 1814612 (E.D.N.Y. Nov. 15, 1999), petition for review granted (2d Cir. July 12, 2000) (Add.74); Golan v. Ohio Savings Bank, No. 98 C 7430,1999 WL 965593 (N.D. Ill. Oct. 14, 1999), petition for rev. denied (7th Cir. Nov. 16, 1999) (Add.84); Hamilton v. North Amer. Mortgage Co., No. 98-58-P-H, 1999 WL 33117170 (D. Maine Sept. 10, 1999 & July 26, 1999) (Add.106); Buckley v. Firstar Home Mortgage, No. 98 C 5092 (N.D. Ill. Aug. 26,

yield spread premium cases. Without exception, these 44 district court decisions deny class certification on the grounds that individual, not common, issues predominate, and a class action is not superior.

1999) (Add.98); Burgan v. First Nationwide Mortgage Corp., No. C-98-1819-Z (W.D. Wash. May 25, 1999) (Add.118); McBride v. ReliaStar Mortgage Corp., No. 1:98-CV-215-TWT (N.D. Ga. Apr. 29, 1999), petition for review granted (11th Cir. July 8, 1999) (Add.119); Hirsch v. BankAmerica Corp., No. 1:98-CV-1032-ODE (N.D. Ga. Apr. 20, 1999), petition for review granted (11th Cir. June 9, 1999) (Add.127); Medlock v. Chase Manhattan Mortgage Corp., No. 1:98-CV-1927-RWS (N.D. Ga. Apr. 16, 1999), petition for review denied (11th Cir. June 15, 1999) (Add.133); Richter v. Banc One Mortgage Corp., No. CIV 97-2195 PHX RCB, 1999 U.S. Dist. LEXIS 16074 (D. Ariz. Mar. 19, 1999), petition for review denied (9th Cir. June 18, 1999) (Add.136); Paul v. National City, No. 1:98-CV-216-WBH (N.D. Ga. Mar. 11, 1999) (Add.151); Drootman v. First Nationwide Bank, No. 97-252 PHX TSZ (D. Ariz. Feb. 12, 1999) (Add.171); Dierker v. Cimarron Mortgage Co., No. 2:98-CV-30-WCO (N.D. Ga. Jan. 19, 1999) (Add.181); Latimer v NF Inv., No. 1:98-CV-220-ODE (N.D. Ga. Jan. 7, 1999) (Add.186); Snow v. Chevy Chase Bank, F.S.B., Civil No. 3:98-0687-19 (D.S.C. Jan. 5, 1999) (Add.191); Lowery v. Ameriquest Mortg. Co., f/k/a Long Beach Mortg. Co., No. 3:98-731-19 (D.S.C. Dec. 17, 1998) (Add.198); Lanney v. Delta Funding Corp., No. 4:98CV32 (N.D. Miss. Dec. 1, 1998); Flowers v. Credit Depot Corp. of Tenn., No. 4:98CV52 (N.D. Miss. Dec. 1, 1998), petition for review denied (5th Cir. Feb. 18, 1999); Butrum v. FT Mortgage Cos., No. 4:98CV120 (N.D. Miss. Dec. 1, 1998) (Add.205); Koslowe v. Dime Mortgage, No. 97-960 (KSH) (D.N.J. Sept. 9, 1998), petition for review denied (3d Cir. Feb. 9, 1999) (Add.206); Chandler v. Washtenaw Mortgage Co., No. 94-A-1418-N (M.D. Ala. July 29, 1998) (Add.219); Conomos v. Chase Manhattan Corp., No. 97 CIV. 0909 (PKL), 1998 WL 118154 (S.D.N.Y. March 17, 1998) (Add.222); Hinton v. First Am. Mortgage, No. 96 C 5668, 1998 WL 111668 (N.D. Ill. Mar. 4, 1998) (Add.227); Barboza v. Ford Consumer Fin. Co., No. Civ. A. 94-12352-GAO, 1998 WL 148832 (D. Mass. Jan. 30, 1998) (Add.232); Mentecki v. Saxon Mortgage, Inc., No. 96-1629-A (E.D. Va. July 11, 1997) (Add.237); Badio v. Accubanc Mortgage Co., No. 96-12259-RCL (D. Mass. July 2, 1997) (Add.243); Martinez v. Weyerhauser Mortgage Co., No. 94-1610-CIV-RYSKAMP (S.D. Fla. June 25, 1997) (Add.245). The unreported decisions are contained in Appellant's Addendum, Exs. 7-40.

In stark contrast, only a handful of decisions—the instant case and six decisions from the United States District Court for the Northern District of Alabama—have granted class certification in analogous cases.[14] As discussed below, these few minority decisions are premised upon an erroneous interpretation of RESPA.

III. REVERSAL IS REQUIRED BECAUSE INDIVIDUAL ISSUES PREDOMINATE OVER COMMON QUESTIONS IN DETERMINING WHETHER THE YIELD SPREAD PREMIUMS SATISFY THE RESPA SECTION 8(c) EXEMPTION.

In its September Order, the district court provided no predominance analysis with respect to RESPA section 8(c), much less the "rigorous analysis" required by Rule 23. Instead, the district court adopted and incorporated the same predominance analysis it used in an earlier order certifying a Minnesota-only, single-broker class.[15]

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[14] Dujanovic v. MortgageAmerica, Inc., 185 F.R.D. 660 (N.D. Ala. 1999); Culpepper v. Inland Mortgage Corp., CV 96-BU-0917-S (N.D. Ala. June 22, 1999), petition for review granted, (11th Cir. Sept. 29, 1999) (Add.253); Heimmermann v. First Union Mortgage Corp., 188 F.R.D. 403 (N.D. Ala. 1999), petition for review granted, (11th Cir. Oct. 19, 1999); Taggart v. Great E. Fin.Servs., Inc., No. 98-C-1697-W (N.D. Ala. Sept. 27, 2000) (Add.279); Perry v. Mid South Mortgage, Inc., No. 98-CV-3205 (N.D. Ala. Aug. 31, 2000) (Add.264); Wilson v. Commercial Fed. Mortgage Corp., No. 98-J-0184-S (N.D. Ala. Mar. 22, 2000) (Add.263). On January 23, 2001, the Eleventh Circuit heard interlocutory appeals in Culpepper and Heimmermann, along with two other cases where class certification was denied, Hirsch and McBride. As in this Circuit, the majority of decisions in the Eleventh Circuit (14 decisions) have denied class certification in like cases. See supra n.13.

[15] In its September Order, the district court stated: "the Court concludes that [a nationwide] class is entirely consistent with the common questions of law and fact described by the Court in the March 22, 2000, Order [certifying a single-broker

This predominance analysis does not, however, support the certification of a nationwide class[16] in this case, because it is predicated upon the application of an incorrect legal standard for evaluating yield spread premiums under RESPA section 8(c). Properly interpreted, the RESPA section 8(c) exemption raises a host of individual, fact-intensive, loan-specific questions that predominate over any questions common to the class.

A. Individual Issues Predominate Under the HUD Policy Statement Two-Step Test for Establishing the RESPA Section 8(c) Exemption.

The individualized, fact-intensive, loan-specific inquiry required to analyze the RESPA section 8 claims in this case is confirmed by the HUD Policy Statement two-step test for establishing the section 8(c) exemption. The HUD Policy Statement test asks two questions: (1) "whether there were goods or facilities actually furnished or services actually performed [of the proper quantity and quality] for the total compensation paid to the mortgage broker;" and (2) "whether the payment is

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class]." (Sept. 26, 2000 order at 2.) (Add.29.)

[16] The nationwide, all-broker class certified in the September Order necessarily subsumes and supercedes the Minnesota-only, single-broker, Heartland-only class certified in the March Order. There no longer is any Heartland-only class; the loans brokered by Heartland are included within the nationwide class. In any event, the determination by this Court of the proper legal standard under RESPA section 8(c) will necessarily determine whether the certification of <u>any class</u> (single-broker, some-broker, or all-broker) is appropriate in this case.

reasonably related to the value [in the relevant geographic market] of the goods or facilities that were actually furnished or services that were actually performed." 64 Fed. Reg. at 10084-86. (Add.40-42.) If these two questions are answered in the affirmative, then a lender's payment of a yield spread premium to a broker satisfies the RESPA section 8(c) exemption, and the payment is legal under RESPA. Since HUD issued the Policy Statement in March 1999, all eight other yield spread premium decisions in this Circuit,[17] and 14 other decisions around the country,[18] have denied class certification in analogous yield spread premium cases on the grounds that individual issues predominate under RESPA section 8(c).

1. Step One: Individual Questions Predominate Regarding Whether the Broker Actually Provided the Proper Number and Type of Goods, Facilities, or Services.

Step one of the HUD Policy Statement test is fraught with individualized, fact-intensive, loan-specific questions which predominate over any questions common to the class. The inquiry under step one is whether the broker actually provided the proper number and type of compensable goods, facilities, or services in connection with the origination of a loan. See Schmitz v. Aegis Mortgage Corp., 48 F. Supp. 2d 877, 882 (D. Minn. 1999) ("Schmitz II") ("Under the Policy Statement, the threshold

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[17] See supra n.12 citing cases.

[18] See supra n.13 citing cases.

question is simply whether the mortgage broker has provided legitimate goods or services in connection with the loan transaction."); Levine v. North Am. Mortgage, 188 F.R.D. 320, 331 (D. Minn. 1999) (the first step focuses on whether broker provided services); Potchin v. The Prudential Home Mortgage Co., No. 97-CV-525 (CBA), 1999 WL 1814612, at *6 (E.D.N.Y. Nov. 15, 1999) (Add.78) (same) ; Golan v. Ohio Savings Bank, No. 98 C 7430, 1999 WL 965593, at *5 (N.D. Ill. Oct. 14, 1999) (Add.88) (same).

The Policy Statement provides a non-exhaustive list of fourteen different "services" a broker may provide to justify compensation paid by a wholesale lender. (Id. at 10085.) (Add.41.) These include all the various services a broker performs in originating and processing a loan including, for example, "filling out the application, ordering required reports and documents, counseling the borrower and participating in the loan closing." (Id. at 10081.) (Add.37.) According to HUD, step one is satisfied if the broker takes the loan application, and performs at least five of the fourteen "compensable" services. (Id. at 10085.) (Add.41.) The Policy Statement also describes the kinds of "goods" and "facilities" for which compensation may be paid by a wholesale lender:

> For example, appraisals, credit reports, and other documents required for a complete loan file may be regarded as goods, and a reasonable portion of the broker's retail or "store-front" operation may generally be regarded as a facility for which a lender may compensate a broker.

Id. at 10085. (Add.41.)

The district court simply cannot determine whether the broker provided the proper number and type of compensable goods, facilities, or services without examining each class member's individual loan transaction. HUD itself recognized the individualized nature of this inquiry:

> Mortgage brokers provide various services in processing mortgage loans . . . They may also offer goods and facilities, such as reports, equipment, and office space to carry out their functions. The level of services mortgage brokers provide in particular transactions depends on the level of difficulty involved in qualifying applicants for particular loan programs. . . . Also, the mortgage broker may be required to perform various levels of services under different servicing or processing arrangements with wholesale lenders.

64 Fed. Reg. at 10081 (Add.37) (emphasis added).

The overwhelming majority of district court decisions agree that step one of the HUD Policy Statement test raises individual questions that predominate in yield spread premium cases. See, e.g., Potchin, 1999 WL 1814612, at *6 (Add.78.) ("This first step would necessitate an inquiry into the facts of each individual transaction between the borrower, broker and lender to determine what compensable goods, facilities or services have been furnished or performed"); Golan, 1999 WL 965593, at *7 ("Whether or not an individual mortgage broker provided services to an individual borrower in any given loan transaction necessitates a transaction-by-transaction

inquiry"). Here, too, individual questions predominate on step one of the test.

2. Step Two: Individual Questions Predominate Regarding Whether the Broker's Total Compensation, Including Any Yield Spread Premium, Is Reasonable In Relation to the Market Value of the Goods, Facilities, or Services.

If the broker provided the proper number and type goods, facilities, or services, then the liability analysis moves to step two. The second step of the HUD Policy Statement test also raises individualized, fact-intensive, loan-specific questions that predominate over any questions common to the class. According HUD, a lender satisfies step two by presenting evidence that the "total compensation" the broker received is "reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." 64 Fed. Reg. at 10084. (Add.40.) See also Schmitz II, 48 F. Supp. 2d at 882 (the step two question is "whether the quantum of goods, facilities, and services provided is reasonably related to the 'total compensation' received by the broker").

HUD considers this second step the "determinative test under RESPA." 64 Fed. Reg. at 10085 (Add.41) (emphasis added). "Total compensation" means the broker's compensation from all sources, including "direct origination and other fees paid by the borrower," and any "indirect fees" from the lender (e.g., a yield spread premium) even though ultimately paid by the borrower through a higher interest rate.

(Id at 10086.) (Add.42.) Under step two, this "total compensation" must be "commensurate with that amount normally charged for similar services, goods or facilities. This analysis requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets." (Id. at 10086.) (Add.42.) "[T]he excess over the market rate may be used as evidence of a . . . violation of . . . RESPA." (Id.)

Like step one, step two requires the court to perform very individualized, fact-intensive, loan-specific inquires in each class members' mortgage loan transaction. To determine whether the total compensation paid to the mortgage broker in a particular loan transaction was reasonable, the trier of fact must, at minimum, consider (1) the total goods, facilities, and services actually provided in each transaction; (2) whether any goods, facilities, and services actually provided in a particular loan transaction were unnecessary or duplicative; (3) the total amount of the fee(s) paid to the broker from both the borrower and the lender in each transaction; (4) the "market value" of the goods, facilities, and services in the relevant geographic area; and (5) whether the total amount of the fee(s) paid to the broker in a particular loan transaction were reasonably related to the "market value" of the broker's contribution. See Potchin, 1999 WL 1814612, at *9. (Add.81.) See also Hamilton v. North Amer. Mortgage Co., No. 98-58-P-H, 1999 WL 33117170, at *7 (D. Maine Sept. 10, 1999 & July 26,

1999) (Add.113) (reasonableness of fees "can only be addressed on a loan-by-loan basis"). Such loan-specific inquiries effectively render individual questions predominant over any common questions in this case.

B. The District Court Failed to Accord Proper Deference to the HUD Policy Statement.

In certifying a nationwide class, the district court held that the HUD Policy Statement is not controlling authority because it is "irrational" in that it is contrary to the purposes of RESPA. (March 22, 2000, Order at 10.) (Add.20.) The district court concluded "that the [Eleventh Circuit's] Culpepper [19] test is the appropriate standard for determining whether [lender payments to brokers] are legal under RESPA." (Mar. 22, 2000 Order at 10.) (Add.20.) The district court's refusal to give deference to the HUD Policy Statement constitutes a manifest error of law which is subject to de novo review.

1. The HUD Policy Statement Is Binding Legal Authority.

As this Court has recognized, "[a]n administrative agency enjoys broad discretion in carrying out the mandates of its governing statutes." Mausolf v. Babbit, 125 F.3d 661, 677 (8th Cir. 1997) (citing Chevron USA, Inc. v. Natural Resources

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[19] Culpepper involved an appeal from a district court's grant of summary judgment to a lender on a RESPA section 8 claim, not class certification. (See discussion infra § III(C).) As noted supra n.13, the district court's subsequent certification of a class is presently on appeal to the Eleventh Circuit.

Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). An agency's interpretation of a statute it is charged to administer, and its interpretations of its own regulations, are "dispositive" upon the courts unless proven "demonstrably irrational." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980).[20] Deference is particularly warranted where the agency's interpretation is thorough and reasoned[21] and based upon technical expertise regarding the subject matter of a complex regulatory scheme.[22]

Applying these standards, the HUD Policy Statement is binding. As the federal agency charged with the administration and interpretation of RESPA, 12 U.S.C. §

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[20] See Chevron, 467 U.S. at 842-43 (agency's reasonable interpretation of the statute it is charged to implement is entitled to "controlling weight"); Auer v. Robbins, 519 U.S. 452, 462 (1997) (agency's interpretation of its own regulations, enacted pursuant to its statutory authority are "controlling" unless "plainly erroneous or inconsistent with the regulation.").

[21] See Auer, 519 U.S. at 462 ("The [agency]'s position is in no sense a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.") (citations omitted). See also Orrego v. 833 West Buena Joint Venture, 943 F.2d 730, 735 (7th Cir. 1991) (extent of deference given depends on the "thoroughness, validity, and consistency of the agency's reasoning.").

[22] See Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 943 (7th Cir. 1995) (upholding the Federal Reserve Board's interpretation of TILA in "official staff commentary" because the agency "knows more about banking that [sic] we do.") (emphasis added); Orrego, 943 F.2d at 735 (HUD case noting that "courts generally defer to the views of agencies entrusted with implementing complex federal statutes") (emphasis added).

2617(a), HUD has technical expertise with respect to the subject matter covered by RESPA. The Policy Statement is HUD's official response to a congressional directive. In 1998, Congress expressly "direct[ed]" HUD to issue the "policy statement" in order "to clarify its position" on the legality of "lender payments to mortgage brokers" under RESPA section 8. H.R. Conf. Rep. No. 105-769, 105th Cong., 2d Sess., at 260 (1998), reprinted in 1998 U.S.C.C.A.N 539. Troubled by the mounting litigation caused by the "legal uncertainty," Congress cautioned that "[it] never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or services actually performed to be violations of [RESPA]." (Id.) Congress explained that the policy statement "could provide invaluable guidance to consumers, brokers, and the courts." (Id.) (emphasis added).

The Policy Statement clarifies HUD's views of legality of lender payments to brokers "under existing law." 64 Fed. Reg. at 10084. (Add.40.) The Policy Statement is thorough and reasoned. HUD developed the Policy Statement based upon the knowledge and informed judgments it had acquired through previous rulemaking efforts, id. at 10082-83 (Add.38-39), and the extensive consultation it had "with representatives of government agencies, as well as a broad range of consumer and industry groups . . . ." (Id.) at 10084. (Add.40.) The Policy Statement, which is published in the Federal Register, represents the binding and official position of the

Secretary of HUD. See 24 C.F.R. § 3500.4.

In addition, the Policy Statement is a reasonable interpretation of RESPA. RESPA was enacted in 1974 "to protect home buyers 'from unnecessarily high settlement charges caused by abusive practices . . . ." 12 U.S.C. § 2601(a). Congress enacted section 8 to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). Section 8 was intended to address only "a particular kind of abuse that it believed interfered with the operation of free markets—the splitting and kicking back of fees to parties who did nothing in return for the portions they received." Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985) (emphasis added) (citing S. Rep. 93-866, 93rd Cong. 2d Sess. (1974), reprinted at 1974 U.S. Code Cong. & Admin. News 6551). As the language of section 8(c) makes clear, section 8 was not intended to prohibit payments to parties who actually do something—i.e., provide goods or facilities, or actually perform services—for the compensation they receive.

In a particularly well-reasoned yield spread premium decision out of the District of Minnesota, Judge Doty expressly rejected the argument that the HUD Policy Statement somehow "undermines the statutory purposes of RESPA." In re Old Kent Mortgage Litig., 191 F.R.D. at 162. Judge Doty stated:

> Congress . . . enacted RESPA to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices that have

> developed in some areas of the country." "By simply ensuring that the broker's total compensation is reasonably related to the goods or services the broker actually furnishes, the Policy Statement serves RESPA's primary goal of preventing kickbacks or referral fees that unnecessarily and unreasonably increase the costs of settlement services." . . .

Id. (citations omitted).[23]

The overwhelming majority of decisions in this Circuit and around the country agree with Judge Doty that the HUD Policy Statement is reasonable and is binding upon the courts. See, e.g., Levine, 188 F.R.D. at 328 (court obligated to adopt HUD's Policy Statement test to determine legality of yield spread premium under RESPA); Potchin, 1999 WL 1814612, at *8 (Add.79) (HUD's interpretation of RESPA given "controlling weight"); Golan, 1999 WL 965593, at *7 (Add.89) (HUD Policy Statement test "is entitled to great deference"). The district court's refusal to give deference to the HUD Policy Statement constitutes a manifest error of law which is grounds for reversal of the class certification order.

2. The District Court Improperly Substituted Its Own Interpretation of RESPA Section 8(c) for that of HUD.

As this Court has recognized, "[a] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency."

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[23] In actuality, it is the interpretation of RESPA section 8(c) by the district court in this case which is inconsistent with the purposes of RESPA because it renders all yield spread premiums illegal per se under RESPA. (See supra § III(B)(c).)

United Transp. Union v. Slater, 149 F.3d 851, 854 (8th Cir. 1998). In this case, the district court applied its own legal standard rather than the standard set forth by HUD in the Policy Statement. According to the district court, step one of the section 8(c) test requires the lender to show that its method of calculating the yield spread premium was based upon the specific, individual goods, facilities, or services provided by the broker. Applying this test, the district court concluded that because yield spread premiums are, by definition, calculated based upon interest rate, the Glovers can present common evidence (e.g., the lender's rate sheets) which may establish a class-wide violation of step one. (See March Order at 11.) (Add.21.) This test is ostensibly based upon the Eleventh Circuit's decision in Culpepper, as that decision has been construed by the district court and a handful of decisions in the Northern District of Alabama.[24] As shown below, the district court's test is inconsistent with the HUD Policy Statement and RESPA .

a. The District Court's Test Improperly Focuses On the Lender's Method of Calculating Yield Spread Premiums.

There is nothing in RESPA section 8, Regulation X, or the HUD Policy Statement which suggests that a lender's method of calculating yield spread premiums

[24] As discussed infra § III(C), the interpretation of RESPA section 8(c) by the district court below is actually inconsistent with the Eleventh Circuit's decision in Culpepper.

constitutes the proper test under RESPA section 8(c). On the contrary, the Policy Statement rejects such a test. HUD expressly recognizes that all yield spread premiums, by definition, are calculated, in part, based on interest rate:

> All compensation to the broker either is paid by the borrower in the form of fees or points, directly or by addition to principal, or is derived from the interest rate of the loan paid by the borrower.

64 Fed. Reg. at 10086 (Add.42) (emphasis added). HUD also recognizes that an itemization or allocation of specific, individual goods, facilities, and services provided by the broker is not required:

> [HUD] recognizes that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are "for" the lender and [others] . . . are "for" the borrower. HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible . . . .

(Id. at 10086 (Add.42) (emphasis added).)

After recognizing that all yield spread premiums are calculated by lenders based on interest rates (and not based upon specific, individual goods, facilities, and services), HUD concludes that such payments are not illegal per se. (Id. at 10084.) (Add.40.) Instead, HUD recognizes that yield spread premiums may used by borrowers as a method of financing closing costs and that such payments actually benefit borrowers by reducing the up-front costs of obtaining a mortgage. 64 Fed.

Reg. at 10080-81, 86. (Add.36-37, 42.) By recognizing that all yield spread premiums are calculated based on interest rate, and that a borrower and broker may structure the loan to include a yield spread premium to finance closing costs, HUD necessarily rejects the notion that liability under RESPA is determined solely from the lender's perspective based upon the method of calculation.

Thus, step one of the section 8(c) test focuses not upon how the lender calculated the yield spread premium, but instead upon whether the broker actually provided the proper number and type of goods, facilities, and services in connection with the origination of a loan. The inquiry then moves to step two: the reasonableness of the broker's total compensation. This is the conclusion reached by every other decision in this Circuit, and the overwhelming majority of decisions in the country. See, e.g., In re Old Kent Mortgage Litig., 191 F.R.D. at 162 ("The reasonableness approach promotes the ability of consumers to reduce up-front costs in obtaining mortgage loans while at the same time preventing brokers and lenders from raising settlement costs unreasonably high."); Levine, 188 F.R.D. at 331 ("neither step of the inquiry depends on a finding whether the yield spread premium was tied specifically to, or paid in exchange for services provided."); Brancheau, 187 F.R.D. at 593 (first step of Policy Statement test focuses on whether broker provided services); Schmitz II, 48 F. Supp. 2d at 881 ("yield spread premiums are, by definition, tied to financial

aspects of the loan rather than some specific broker good or service."); Golan, 1999 WL 965593, at *5 (Add.88) ("a plaintiff cannot merely rely on a showing that the premium was unconnected to specific services. . . ."); Potchin, 1999 WL 1814612, *6 (Add.78) (rejecting argument that goods or services must be "tied" directly to the payment); Hamilton, 1999 WL 33117170, at *6 (Add.112) ("HUD policy statement requires neither a direct tie or relationship between the yield spread premium and the services provided by the broker").

The district court's certification of a nationwide class is founded upon a legally erroneous interpretation of RESPA section 8(c).

b. The District Court's Test Improperly Focuses on the Yield Spread Premium in Isolation, Rather than on the Broker's "Total Compensation."

The district court's RESPA section 8(c) test is also legally erroneous because it focuses on the yield spread premium in isolation, rather than the broker's "total compensation." As HUD makes clear, the yield spread premium cannot be evaluated in isolation, but instead must be evaluated as part of the broker's total compensation:

> In applying the test, HUD believes that total compensation should be scrutinized . . . to determine whether it is legal under RESPA. Total compensation . . . includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from interest rate paid by the borrower, or a combination of some or all.

64 Fed. Reg. at 10084. (Add.40.) For this reason too, the district court's RESPA

section 8(c) test, which focuses solely on yield spread premiums and ignores total compensation, is legally erroneous.

c. The District Court's Test Would Actually Render All Yield Spread Premiums Illegal Per Se.

Finally, the district court's RESPA section 8(c) test runs afoul of the admonitions of HUD and Congress that yield spread premiums are not per se illegal under RESPA section 8. If the district court is correct, and step one focuses only on the yield spread premium in isolation, only from the perspective of the lender, based solely on the lender's method of calculation, then no yield spread premiums would be legal. As one well-reasoned district court decision explained:

> HUD recognizes that yield spread premiums are calculated on the basis of the interest rate and points of the loan in relation to the "par" rate. Yet, the Policy Statement does not consider such premium payments illegal per se. . . . HUD's statement would be a nullity, however, if the Court were to construe section 8(c) of RESPA to require a quid pro quo [i.e., a tie] relationship between lender premium payments and the goods, services, and facilities furnished by the broker. One wonders when a yield spread premium would be legal under RESPA if it is, by definition, a function of interest rates rather than the benefits the broker provides. The answer is that Plaintiff's position permits no instance in which a premium payment is legal.

Isara v. Community Lending Inc., Civ. No. 99-00310SPK, slip op. at 11-12 (D. Haw. Jan. 20, 2000) (Add.68-69) (alteration and emphasis added). See also Taylor v. Flagstar Bank, FSB, 181 F.R.D. 509, 522 (M.D. Ala. 1998) ("The biggest problem

with [plaintiff's] argument is that somewhere—at its core—it must rest on the assumption that the conduct of the Defendant was always illegal.") For this additional reason, the district court's test is a legally incorrect interpretation of RESPA section 8(c).

C. Individual Issues Predominate Under the Eleventh Circuit's Decision in Culpepper.

Assuming, arguendo, that the district court was correct that Culpepper, not the HUD Policy Statement, sets forth the controlling legal standard for liability under RESPA section 8(c), the district court's certification of a nationwide class should still be reversed. The district court badly misinterpreted Culpepper, which does not support the certification of a nationwide class in this case.

1. Culpepper Recognized the Individualized Inquiry is Required to Evaluate Yield Spread Premiums Under RESPA Section 8(c).

The question before the court in Culpepper was not class certification, but instead was a defendant lender's motion for summary judgment based on the RESPA section 8(c) exemption. In Culpepper I, the court reversed the lower court's grant of summary judgment in favor of the lender. According to the Eleventh Circuit, the first question under RESPA section 8(c) is whether payment to the broker was to compensate the broker for "any good, [facility,] or service." Culpepper I, 132 F.3d

at 697. "[I]f the payment is for a good, [facility,] or service in the first instance," the second question becomes whether the amount of the payment to the broker was reasonable—i.e., "whether the payment is so excessive that the excess should be characterized as a referral fee" in violation of RESPA. (Id.)

In applying this two-part test to the Culpeppers' loan transaction, the Eleventh Circuit analyzed the record evidence from the perspective of all three parties: the borrower, broker, and lender. From the perspective of the borrower and broker, the court held that "no evidence suggests that [the direct origination fee paid by the Culpeppers] was not intended by both Premier [the broker] and the Culpeppers to compensate Premier fully for the work . . . ." (Id. at 696 (emphasis supplied).) From the lender's perspective, the court ruled that the only evidence before the court at that time, on that one loan, was that the payment was "tied" to the "interest rate," and not "the quantity of quality of the services." (Id. at 697.) The Eleventh Circuit then concluded, on the record then presented, that the lender was not entitled to summary judgment on the section 8(c) defense. The court noted, however, that "[m]ortgage transactions are structured in a variety of ways," and that its holding was "highly dependent upon the facts of this financial transaction." (Id. at 697 n.5.)

In Culpepper II, the Eleventh Circuit clarified its earlier holding, explaining that "[t]he only issue decided . . . was whether as a matter of law [the lender] had proven

in the instant record that this yield spread premium for this table-funded loan was a payment for goods or services and therefore not a prohibited referral fee." Culpepper II, 144 F.3d at 718 (emphasis added). The court expressly rejected the suggestion that "RESPA prohibits the payment of all reasonable yield spread premiums by mortgage lenders to mortgage brokers who actually furnish services or goods." (Id. at 718.) Instead, the court held that yield spread premiums may be used by borrowers as a way to "financ[e] closing costs," id., which is necessarily a loan-specific inquiry. The court then stressed again that its earlier decision "was highly dependent upon the facts in the current record about [the particular] table-funded financial transaction." (Id.) The court emphasized that Culpepper I did not prevent the lender "from attempting to prove its case at trial." (Id. at 719.) Thus, the Culpepper actually highlights the individualized inquiry required under section 8(c), which renders class treatment inappropriate in yield spread premium actions.

2. Culpepper Requires Examination of the Intent of the Broker and Borrower In Each Individual Loan Transaction.

Culpepper requires a separate examination of the intent of both the broker and borrower in each individual loan transaction to determine if they intended to use the yield spread premium to finance closing costs, including broker compensation. Regardless of any generalized proof of purported lender intent (e.g., rate sheets), a

court must still separately examine the intent of both the broker and borrower in each and every loan transaction to determine if they intended to use the yield spread premium to finance the borrower's closing costs. For this reason, at least 15 courts denied class certification of RESPA claims in yield spread premium cases following the Eleventh Circuit's opinions in Culpepper, but before HUD issued its Policy Statement.[25]

A particularly well-reasoned and oft-cited decision denying class certification under the Culpepper rationale is Taylor v. Flagstar Bank, FSB, 181 F.R.D. 509 (M.D. Ala. 1998). In Taylor, the court stated:

> No matter what Plaintiffs can easily prove about the general contours of these transactions, Plaintiffs still cannot prove (by a class method) that none of the yield spread premiums at issue were earned through the provision of services. The Defendant might prove—maybe just in a single transaction, but perhaps in all of the transactions—that the yield spread premium "represented additional payment for the [the broker's] services to" the lender and the borrowers.
>
> . . . [Plaintiffs] leave out the step of whether the yield spread premium might be only part of the broker's compensation for services. Instead, Plaintiffs assume that the compensation from the borrowers was meant to pay the broker in full for his services. . . . Plaintiffs offer no way of knowing whether the compensation from the borrower was intended as full compensation; they simply assume that it was. This was one of the central facts of the Culpepper decision—all of the evidence there indicated that the fee paid by the borrowers to the broker was supposed to compensate the broker "fully for the work it did for the"

[25] See supra n.12 and 13 citing cases.

> borrowers. . . . Here, that evidence or allegation from the Plaintiffs is lacking. Indeed, there is testimony from the broker in the Plaintiffs' transaction that he would have charged them more if the premium were not available in this case. . . .

Id. at 523 (citations omitted; emphasis added). The Taylor court recognized that "[w]hether the borrower's payment was intended as full compensation, or whether the yield spread premium was intended as additional compensation is an issue to be determined as to each transaction." (Id. at 524.) The Taylor court then concluded: "instead of helping the plaintiffs' case for class certification, Culpepper actually hurts it in emphasizing the fact that RESPA liability is highly dependent upon the facts of a particular transaction." (Id. at 523.)

The overwhelming majority of other decisions agree with Taylor. In Richter v. Banc One Mortgage Corp., the court stated:

> [A]fter Culpepper an individualized issue still remained regarding . . . whether in each specific case the borrower and broker intended the borrower's payments to constitute full compensation for services rendered by the broker.
>
> . . . In Culpepper, the Eleventh Circuit stated that a mortgage lender . . . charged with a RESPA violation could attempt to prove that the borrower and broker did not intend for the borrower to completely compensate the broker for its services, leaving open the possibility that the lender's fees could constitute additional compensation. . . . Like the district court in Taylor, this court concludes that the question of the borrower and broker's intent regarding payments for the broker services will require case-by-case analysis of each broker and borrower's specific situation.

No. CIV97-2195 PHX RCB, 1999 U.S. Dist. LEXIS 16074, at *24-26 (D. Ariz. Mar. 19, 1999) (emphasis added) (citations omitted). (Add.147-48.) Accord Briggs v. Countrywide Funding Corp., 188 F.R.D. 645, 650 (M.D. Ala. 1999) (plaintiff's generalized evidence that the lender did not intend yield spread premium as compensation for services performed by the broker "would not foreclose [defendant] from offering its own evidence that in an individual case the borrower and broker did not intend for the borrower to pay all of the broker's compensation, but rather intended a combination of payments from both the borrower and the mortgage lender.") (quoting Richter, 1999 U.S. Dist. LEXIS 16074, at *27 (Add.148)); Hinton v. First American Mortgage, No. 96 C 5668, 1998 WL 111668, at *6 (N.D. Ill. Mar. 3, 1998) (Add.231) ("Culpepper does not negate our analysis as to the lack of predominance of common issues.").

In certifying a nationwide class in this case, the district court failed to properly apply Culpepper. The district court—like the small minority of decisions out of the Northern District of Alabama—ignored the critical portion of the Culpepper analysis which requires examination of whether the broker and borrower intended the yield spread premium as additional compensation to the broker. Instead, the district court analyzes the yield spread premiums solely from the perspective of the lender, focusing on the lender's method of calculating yield spread premiums based on interest rate.

Properly applied, Culpepper (like the Policy Statement) requires an individualized, loan-by-loan inquiry which precludes class certification in this case.

IV. REVERSAL IS REQUIRED BECAUSE INDIVIDUAL ISSUES PREDOMINATE ON WHETHER THE YIELD SPREAD PREMIUMS ARE "REFERRALS" UNDER RESPA SECTION 8(a).

This Court should also reverse the district court's September Order certifying a nationwide class because individual predominate under RESPA section 8(a). The district court failed to even address how the test for a "referral" fee under section 8(a) could be resolved on a class-wide basis in this case. In fact, none of the district court's three class certification orders in this case address the essential element of a RESPA section 8(a) claim. The district court provides no analysis, much less the "rigorous analysis" required by Rule 23. HUD's RESPA section 8(a) test under 24 C.F.R. § 3500.14(f)(1)—i.e., that the lender payment "affirmatively influenc[ed]" the broker's selection of that lender over other lenders to fund a loan—demonstrates conclusively that individual questions predominate under section 8(a).

In this case, in order to determine whether Standard Federal's payment of a yield spread premium constituted a "referral" under section 8(a), the district court must look at each broker's reasons for selecting Standard Federal to fund each putative class member's loan. It is undisputed in this record that brokers, such as Heartland, select lenders, such as Standard Federal, based on a variety of factors, unrelated to

yield spread premiums. For example, because there is little difference in wholesale rates available from various lenders, Heartland looks to other factors including, for example, the lender's service, turnaround time, reputation, underwriting flexibility, and product availability, in selecting a wholesale lender. (A.297-98.) Heartland does not select a wholesale lender such as Standard Federal because of the yield spread premium "unless it allowed Heartland to offer the borrower a better deal." (Id). There is nothing in the record to suggest that Heartland or any other broker in Standard Federal's network selects Standard Federal only because it offers a yield spread premium. The Glovers' burden under Rule 23 cannot be satisfied by bald allegations and unsupported speculation about a standard business practice of paying referrals.

Several summary judgment decisions in analogous yield spread premium cases highlight the fact-intensive, loan-specific, individual inquiry required to establish that a yield spread premium is a "referral" in violation of section 8(a). For example, in Briggs v. Countrywide Funding Corp., No. 95-D-859-N, slip op. at 7-9 (M.D. Ala. Aug. 27, 1998) (Add.282), the lender argued that it was selected by the broker to fund the plaintiff's loan not because of a yield spread premium, but instead because plaintiff's high loan-to-value ratio required private mortgage insurance (PMI), and it was the only lender with whom the broker dealt which was able to provide PMI. In response, the plaintiff argued that another lender had refused to fund the loan because

of a problem with the appraisal, not because plaintiff needed PMI. In denying cross-motions for summary judgment, the court held that the lender's defense that it did not violate RESPA section 8(a) because the broker's "reasons for referring the loan" were not related to the lender's payment of a yield spread premium was an individual fact question for the jury. (Id.)

In Barbosa v. Target Mortgage Corp., 968 F. Supp. 1548 (S.D. Fla. 1997), the court held that payment of a yield spread premium could not have "affirmatively influenced" the decision to select the lender to fund the plaintiff's loan in violation of RESPA section 8(a), and granted summary judgment in favor of lender. The court stated:

> The Court concludes that [defendant] cannot have violated [RESPA § 8](a), because the undisputed record evidence establishes that its payment to [the broker] was not for the referral of business. HUD's definition of referral confirms this conclusion. . . . [Defendant] therefore did not pay [the broker] the yield spread differential for "affirmatively influencing the selection by any person of a provider of a settlement service," but for [the broker]'s procurement of a loan that matched the third option.

(Id.) at 1557-58 (emphasis added). See also Hastings v. Fidelity Mortgage Decisions Corp., 984 F. Supp. 600, 611-12 (N.D. Ill. 1997) (finding that where (a) all lenders with whom the broker did business offered yield spread premiums, and (b) the yield spread premium paid in connection with the plaintiffs' loan was in the range of those readily available from other lenders, it was likely that "the offering of yield spread premiums

[did] not influence a broker's choice of one lender rather than another.") (emphasis added). These cases illustrate the individualized, fact-intensive inquiry that must be performed with respect to every class members' loan transaction in order to determine whether a violation of section 8(a) has occurred.

V. REVERSAL IS REQUIRED BECAUSE A CLASS ACTION IS NOT A SUPERIOR METHOD FOR ADJUDICATING RESPA SECTION 8 CLAIMS.

The district court abused its discretion by failing to address the superiority requirement of Rule 23(b)(3). Again, this hardly satisfies the "rigorous analysis" required under Rule 23. Given the viability of individual RESPA section 8 actions, and the manageability problems inherent in a RESPA section 8 class action, lack of superiority also supports denial of class certification in this case.

A. Individual Actions, Not Class Actions, Are the Superior Method for Adjudicating RESPA Section 8 Claims.

"The interest of members of the class in individually controlling the prosecution or defense of separate actions" is pertinent to superiority. Fed. R. Civ. P. 23(b)(3)(A). The Glovers' argued below that, absent class certification, the conduct at issue will never be redressed given the amount of individual damages and the costs of individual litigation. Contrary to the Glovers' argument, individual actions are not in any way inferior to class action litigation. Indeed, RESPA provides for "treble damages,

attorneys' fees, and costs are available for individuals to prosecute their own claims." Schmitz I, 1999 WL 1100084, at *5. (Add.218.) See 12 U.S.C. § 2607(d)(2) & (5). See also Taylor, 181 F.R.D. at 524 (noting lack of superiority given availability of treble damages and attorney's fees); Potchin, 1999 WL 1814612, at *10 (Add.81) (same); Golan, 1999 WL 965593, at *7 (Add.89) (same). Therefore, each putative class member may economically prosecute his or her own claim. For this reason, a class action is not superior over individual actions.

B. Class Treatment of RESPA Section 8 Claims Would Be Unmanageable.

The "difficulties likely to be encountered in the management" of the class constitute another critical element in the superiority determination.[26] See Fed. R. Civ. 23(b)(3)(D). If resolution of the class claim "breaks down into an unmanageable variety of individual legal and factual issues," class certification is inappropriate. Andrews, 95 F.3d at 1023. Here, there is a class with potentially hundreds of

[26] See Andrews, 95 F.3d at 1025 ("Litigating the plaintiffs' claims as class actions no matter what the cost in terms of judicial economy, efficiency, and fairness runs counter to the policies underlying Rule 23(b)(3). . . . While we recognize that Rule 23 is to be applied flexibly, the manageability problems discussed above defeat the Rule's underlying purposes and render these claims inappropriate for class treatment.").

thousands of members, all asserting claims based upon the payment of yield spread premiums to several thousand different brokers, who originate loans with different practices and procedures, in connection with unique loan transactions with different interest rates, points, and yield spread premiums. As to each loan, evidence regarding the level of services provided by the broker, the financial objectives and goals of the borrower, the reasonableness of the broker's total compensation, and a host of other loan-specific facts would, under this case, be utterly unmanageable as a class action. "[T]he determination of liability would inevitably 'devolve into [a] . . . thicket of individualized claims.'" Schmitz I, 1999 WL 1100084, at *4. (Add.218.) This fact intensive individualized inquiry would render a class action unmanageable and not a superior method of adjudication. See Taylor, 181 F.R.D. at 524; Conomos v. Chase Manhattan Corp., No. 97 CIV. 0909 (PKL), 1998 WL 118154, at *4 (S.D.N.Y. March 17, 1998) (Add.224-25); Yasgur v. Aegis Mortgage Corp., No. 98-CV-121, slip op. at 12-13 (D. Minn. Mar. 10, 1999) (Add.169-70); Mentecki v. Saxon Mortgage, Inc., No. 96-1629-A, slip op. at 4 (E.D. Va. July 11, 1997) (Add.240). In sum, the district court's certification should be reversed on manageability grounds.

CONCLUSION

Based upon the foregoing, this Court should reverse the district court's order certifying a nationwide class because individual questions predominate over questions

common to the class on the Glovers' RESPA section 8 claims, and because a class action would not be superior.

Respectfully submitted,

Dated this 5th day of February, 2001.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the Appellant's Brief complies with the type-volume limitation contained in Rule 32(a)(7)(B), as it was typed using Corel WordPerfect 8, in 14 point Times New Roman type style and contains 13,949 total words.

CERTIFICATE OF SERVICE

I CERTIFY that on February ___, 2001, two (2) copies of APPELLANT'S BRIEF were served on the following:

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